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In the

Supreme Court of the United States

October Term, 1957

No. 904

E. V. PRENTICE MACHINERY CO. and
PRENTICE MACHINERY WORKS, INC.,
Petitioners,

vs.

ASSOCIATED PLYWOOD MILLS, INC.,
Respondent.

Petition for a Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

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DAILY JOURNAL OF COMMERCE

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In the Supreme Court of the United States

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No. ————

E. V. PRENTICE MACHINERY CO. and
PRENTICE MACHINERY WORKS, INC.,
Petitioners,

vs.

ASSOCIATED PLYWOOD MILLS, INC.,
Respondent.

Petition for a Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

Petitioners, E. V. Prentice Machinery Co. and Prentice Machinery Works, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the District Court (R. 96, App. 1a)* is reported at 113 F. Supp. 182. The opinion of the Court of Appeals (R. 471, App. 11a) has not yet been reported.

* "R." designates page of printed transcript of record. "App." designates page of Appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 1958 (R. 480, App. 25a). The jurisdiction of the District Court was based on 15 U.S.C. § 15 and jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In a private treble damage action under the Clayton Act in which defendant admitted deliberate violation of the Act by an illegal attack on plaintiffs' business, should not a decision of *no* damages be reversed where it is uncontradicted that plaintiffs suffered a sharp decline in business immediately after the violation?

2. Can an admitted violator of the antitrust laws escape payment of any damages whatever because at the time of the illegal attack the business of the victims might have been suffering a temporary decline from other causes?

3. Where plaintiffs in a private treble damage action have proven the amount of damages suffered by them in strict accordance with the decisions of the Supreme Court, have they not at the same time proven the fact of damages?

4. Does not the doctrine of collateral estoppel make conclusive a finding of damage where in the prior proceedings between the parties the same court expressly found that defendant was guilty of bad faith, inequitable conduct and that defendant's conduct had damaged plaintiffs' business?

STATUTES INVOLVED

Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1, 2 (App. 26a, 27a), and Clayton Act, 38 Stat. 730, 15 U.S.C. §§ 14, 15 (App. 27a, 28a).

STATEMENT

This is a private treble damage action under Section 4 of the Clayton Act (15 U.S.C. § 15). Respondent (Associated) admitted liability for deliberate violations of the antitrust laws. The District Court found that there had been a decline in petitioners' business but that it was caused entirely by other factors and held, therefore, that petitioners had suffered no damages.

The materiality and correctness of the following facts are undisputed.

Associated and petitioners, E. V. Prentice Machinery Co. (Prentice), were competitors in offering to the plywood industry automatic veneer patching machines. Associated, without prior notice to Prentice, sent a let-

ter to 29 of Prentice's 31 customers threatening patent litigation unless they ceased using certain Raimann machines purchased from Prentice and account to Associated for profits and damages. The letters were sent in bad faith and with the purpose of destroying Prentice's business (R. 64-67, 76, 77, App. 12a, 13a).

For four months thereafter, until Prentice successfully concluded a declaratory judgment action establishing the invalidity of Associated's patents, Prentice neither sold nor obtained an order for a single Raimann machine. The rest of the petitioners' business also declined (App. 17a, 18a).

Immediately prior to the present trial, Associated admitted liability, and the issue of damages was tried to the court. The trial judge (Hon. Gus J. Solomon, the same judge who had presided at the prior patent action) found that petitioners had suffered no damages, and "the reduction in sales and profits which occurred in 1952 and 1953 was caused by" other factors for which respondent was not responsible (App. 9a).

The Court of Appeals, although stating that the trial court could have found that "appellants' business recession was caused by the wrongful acts . . .," nevertheless affirmed. The Court held that there was substantial evidence tending to show that the drop in busi-

ness was due to other causes, and that the trier of facts was entitled to find, as he did, that (App. 22a):

> ". . . the wrongful conduct for which Associated is chargeable *contributed not at all* to appellants' poor business showing in 1952 or later years."*

REASONS FOR GRANTING THE WRIT

1. A Correct Decision in this Case is Important in the Administration of the Antitrust Laws

This Court has often recognized the public interest in vigilant enforcement of the antitrust laws by means of private treble damage actions and that the private treble damage action is probably the most effective method of deterring violators and implementing a salutary public policy. *Lawlor v. National Screen Service Corp.*, 1955, 349 U.S. 322, 329; and *Nashville Milk Co. v. Carnation Company*, 1958, 355 U.S. —, 2 L. Ed. 340, 349 (separate opinion). See also 61 Yale L. J. 1010, 1058-1062; 63 Harv. L. R. 907, 909.

This is the first private treble damage action ever brought to trial in the Oregon District Court. If the court's decision is not rectified it will stand as an effective barrier against any other private treble damage actions in that court because of the impossible burden

* All emphasis added unless otherwise noted.

of proof the District Court placed on plaintiffs in such actions. The situation is aggravated in the Ninth Circuit by the Court of Appeals' reliance on the "clearly erróneous" rule to affirm the District Court's decision which is contrary to the spirit, if not the letter, of the controlling decisions by this Court.

The action of the Court of Appeals is another indication of the unfavorable view taken in the Ninth Circuit toward antitrust treble damage actions. The other most recent decisions of that Court are *Flintkote v. Lysfjord*, 1957, 246 F.2d 368, cert. denied — U.S. —, and *Standard Oil Co. of Cal. v. Moore*, 251 F.2d 188, decided Nov. 7, 1957.

II. There Is a Conflict With the Decisions of This Court.

The evidence submitted by petitioners to prove damages was at least as good, if not better than, that approved by this Court in the leading cases of *Story Parchment Co. v. Paterson Parchment Paper Co. et al.*, 1931, 282 U.S. 555, and *Bigelow v. RKO Radio Pictures Inc.*, 1946, 327 U.S. 251.* Petitioners, just as plaintiffs in those cases, compared their earnings before and after the admittedly illegal acts and, additionally, petitioners submitted uncontradicted statistical analyses of their business which proved substantial damages (petitioners' ex-

* The Court of Appeals' disposition (footnote 4, App. 21 a) of the cases relied on by petitioners is in avoidance of the meaning and thrust of these decisions. The Court merely extracted for comment a distinction without a difference between the case at bar and those cases.

hibits appearing in appendix to their opening brief in Court of Appeals, filed herewith).

Associated relied on the defense that petitioners' decline in business commenced before Associated's attack and was caused by factors for which Associated could not be held responsible, such as defective equipment, poor management and economic conditions in the plywood industry.* *This defense at best could only serve to mitigate damages* but could not disprove the fact of at least some damages to petitioners which was established by the illegal attack coupled with an admitted decline in petitioners' business (App. 17a, Finding XVII, R. 110).

It is simply incredible that Associated's coercion of Prentice's customers had no effect whatever on Prentice's business. Certainty of causation of injury by an illegal act has been accepted for much less convincing reasons. 64 Harv. L. R. 317, 320, 323, 324.

III. An Authoritative Ruling Should be Made by This Court on the Burden of Proof, and the Fact and Amount of Damages in Antitrust Cases

As will be apparent from the exhibits appearing in the appendix to petitioners' brief in the Court of Ap-

* None of these factors ever hurt petitioners' business before Associated's attack. It is common knowledge that after the trial below economic conditions in the plywood industry grew progressively worse. Given the opportunity of a new trial, petitioners will show that during the same period their business grew progressively better.

peals, filed herewith, and the facts appearing in the foregoing Statement, petitioners proved the fact and amount of their damages about as conclusively as it is possible to prove them in an antitrust treble damage action.

We submit that this Court has recognized that plaintiff in a treble damage action has made out a prima facie case once he has shown a violation of the antitrust laws and a loss of revenue to him. The affirmative burden is then imposed on defendant to show, if he can, *what portion of plaintiffs' loss was not caused by the violation. Bigelow v. RKO Radio Pictures, Inc.*, supra, at p. 264. Associated did not satisfy this burden by its shotgun-type defense.

In view of the public importance of questions relating to the administration and enforcement of the antitrust laws, it is urgent that there be an explicit holding by this Court on that which has been understood by legal scholars and practicing attorneys to be at least implicit in the Court's decisions.*

This Court should also make an express ruling with respect to proof of the fact of damages and the amount

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* See particularly, "Proof Requirements in Antitrust Suits: the Obstacles to Treble Damage Recovery," 18 Un. of Chic. Law Rev. 130, 133, and "The Proof of Damages Under the Anti-Trust Laws," 41 Ill. Law Rev. 462, 464. See also "Damages Under the Anti-Trust Laws," 88 Un. of Pa. Law Rev. 511, 513, 518, 519, and "The Treble Damage Action," 1950 Un. of Ill. Law Forum 659, 671.

of damages in antitrust cases. The Court of Appeals (App. 20a) erroneously separated proof of the fact of damages from that of the amount of damages. If a plaintiff proves the amount of damages, as did petitioners, he has also proved the fact of damages. See the clear statement on this point in 52 Mich. Law Rev. 363, 374, and also 64 Harv. L. R. 317, 318.

IV. The Refusal of the Court of Appeals to Apply the Doctrine of Collateral Estoppel is Contrary to the Decisions of this Court and Policy of Enforcement of the Antitrust Laws.

In the prior litigation between the parties, the District Court's opinion (R. 63, 113 F.Supp. 182) contained findings of fact that Prentice's business had been damaged by Associated's attack (see footnote 3, opinion of the Court of Appeals, App. 15a).

The Court of Appeals rejected petitioners' collateral estoppel argument on the grounds that the findings of the District Court in the prior case as to damages were not essential to the prior decision of that Court, (App. 17a).

There is no justification in law or logic for the Court of Appeals' *ex post facto* appraisal of the prior findings and the Court's selection of which facts were

"adequate" and which were "additional" and "not essential" to the District Court's decision.

It could just as well be said that the District Court's prior findings of damages to Prentice were adequate to support that Court's decision and that the other findings were additional and not essential. A full reading of the District Court's findings (R. 74-78) shows that clearly the District Court considered them to be material and essential to its decision. Associated should not now be permitted to benefit from a restricted interpretation of the facts on which it permitted a final unappealed order to be entered.

Even if we adopt the findings selected by the Court of Appeals, they necessarily add up to the conclusion that Prentice must have been damaged at least to some extent by Associated's attack. The Court of Appeals stated, App. 16a:

> "The purport of these findings is that Associated, with full knowledge of the doubtful validity of the Skoog patents, *and for the purpose of destroying the Prentice competition* while avoiding a court test, engaged in the criticized activity."

The sending of threatening letters to Prentice's customers to destroy competition could not have avoided causing damage to Prentice.

If Associated is permitted to escape the effect of previous findings of the District Court of damages to Prentice, the result will be neither consistent with this Court's policy of enforcement of the antitrust laws or the doctrine of collateral estoppel. *Lawlor v. National Screen Service Corp.*, supra, at p. 329.

CONCLUSION

The decision of the Court of Appeals supports the proposition that it is safe to attack a competitor whose business is already suffering because it is impossible for the victim to prove the amount of damages caused by the wrongdoer.

It is time that this Court called a halt to the continuing trend of hostility in the Ninth Circuit toward antitrust litigation. The petition for writ of certiorari should be granted.

Respectfully submitted,

J. PIERRE KOLISCH
MOE M. TONKON

Attorneys for Petitioners.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Civil No. 7091

E. V. PRENTICE MACHINERY CO. and
PRENTICE MACHINERY WORKS, INC.,
Plaintiffs,

vs.

ASSOCIATED PLYWOOD MILLS, INC.,
Defendants.

OPINION

September 29, 1956

Solomon, Judge:

I find that the plaintiffs did not suffer any damage by reason of the wrongful acts of the defendant, and defendant is therefore entitled to a judgment in its favor.

Comment

This is not a case in which plaintiffs were unable to prove the exact amount of damages which they suffered. It is a case in which plaintiffs failed to prove that they suffered any damage.

I appreciate the fact that it is unusual to disallow

damages in a case in which plaintiffs claimed large damages and the defendant admitted liability. I had therefore hoped to be able to prepare an opinion for publication which would supplement the very interesting history of this action and the facts out of which it arose, which appear in my opinion in the prior case between the same parties. E. V. Prentice v. Associated Plywood Mills, 113 F. Supp. 182 (1953). I had also hoped to set forth in a more polished manner the reasons for my decision. However, because of the press of other urgent work and because of the long delay that has already taken place, I must now announce my decision together with some of the reasons therefor. In the findings of fact that will be entered these reasons may be set forth with greater specificity.

At the commencement of this trial, I was of the opinion that the plaintiffs had suffered serious damage, and in the prior case, at page 184, I stated that the receipt of the Smith and Tuck letter of July 25, 1952, by Prentice's customers caused great consternation and "effectively stopped sales of Raimann machines, as well as other equipment sold or distributed by Prentice." This statement was based upon a representation made to me at the time that plaintiff's attorneys were resisting an application for a delay of the trial. I am now convinced that this statement was

incorrect and that the representations made to me at that time were erroneous.

In order to prove damages, plaintiffs relied primarily upon the books and records of the company which showed the number of sales and the amount of business done from the inception of the business to the date of the trial and upon statistical studies made from these books and records. In this manner they attempted to show the amount of sales and the profits the plaintiffs would have made if the Smith and Tuck letter of July 25, 1952, had not been sent and if the litigation had not occurred.

Plaintiffs were unable to produce even one witness who could testify that he refused to purchase a Raimann machine or other equipment sold by plaintiffs by reason of the Smith and Tuck letter or by reason of the resulting litigation. Likewise, plaintiffs produced no evidence that the Skoog machine or any other automatic patcher replaced a single Raimann machine or that a Skoog or other patcher was sold or leased to a customer who was considering or who might have purchased a Raimann machine.

Plaintiffs' friend John Powers testified that in his opinion plaintiffs did lose business, but there was no factual basis for his opinion and he frankly admitted

that the Smith and Tuck letter made no difference to him and that he purchased everything he intended to purchase from plaintiffs. One witness, Raymond J. Martin, testified that Martin Brothers Box Company, upon receipt of the letter, "held up tentatively any further purchases" but that after the litigation was concluded his company purchased three Raimann machines from the plaintiffs, which was all the machines it had ever contemplated purchasing. He also stated that the Smith and Tuck letter did not affect the purchases of other types of equipment and that his company bought no equipment from any other supplier by reason of the Smith and Tuck letter.

A statistical study employing the method of "least squares" was used as a substitute for specific evidence concerning lost sales. However, in order to make a projection which has any validity, this statistical method requires that one assume that the same conditions would be operative in the future as were operative in the past and that the deviations about the line will be random; in other words, that the deviation around the trend for a particular month is independent from the deviation for every other month. Or stated diiferently, the "least squares" method can be legitimately used only in cases in which there is a mass market with random fluctuations without seasonal or

cyclical variations unless the seasonal variations are unform and can be removed.

The evidence in this case showed that this was not a mass market. The principal items sold from $9,000 or $10,000 each to more than $30,000 each. The sale of one piece of equipment often made the difference between a poor month and a good month, and the equipping of one mill could mean the difference between a poor year and a good one.

In the type of business in which plaintiffs are engaged, personal factors are of great importance. Plaintiffs testified as to the excellent reputation which their father enjoyed and of their wide acquaintance in the industry. Dave Prentice's membership on the Board of Directors of the Medford Veneer and Plywood Company was responsible for a substantial amount of business.

On the other hand, dissatisfaction by customers and suppliers are also important. The evidence showed that many of plaintiffs' customers were dissatisfied for a wide variety of reasons. Some of them did not like the equipment that had been sold to them (Exhibit 102, Roseburg Lumber Co. letter of February 5, 1952; Exhibit 166, Albany Veneer, Inc. letter of February 22, 1952; Exhibit 183, Pacific Veneers, Inc. letter of

September 17, 1952). Some of them thought that the plaintiffs' service was very bad. One customer, Mt. Baker Plywood, Inc., which during the year 1952 had purchased in excess of $72,000 in equipment, ended its letter. "* * * the service which we have received from your company is the worst of any company from whom we have bought equipment. This applies to all of the equipment which we have purchased through your company, which I shall not take the trouble to enumerate at this time." (Exhibit 105.)

The die situation on the Raimann machines was also causing plaintiffs a great deal of difficulty with their customers (Exhibits 109, 113, 154, 162 and 182). Other exhibits indicate that the partners were wasting time, loafing in the office, and not devoting enough time and effort to sales (Exhibit 124). They were deliberately not pushing sales (Exhibits 180 and 200).

In addition to these personal factors, there were many other factors over which plaintiffs had no control. For example, plaintiffs' own exhibit (Exhibit 59) showed that the plywood industry has had considerable cyclical fluctuations throughout the period covered by the graph (1950-1955). The evidence also showed that there were price breaks, some of which corresponded with production breaks. This was par-

ticularly true in November and December, 1951, and November, 1952.

Plaintiffs in letters to the Raimann Company and another manufacturer of equipment as well as to a member of the Prentice family, written in 1952, called attention to the correlation between price and the production of plywood and the demand for equipment. In fact, this was the basis upon which plaintiffs requested the Raimann Company to delay shipping patchers and for the later cancellation of orders (Exhibits 149 and 150). See also Exhibits 101 and 153.). However, at the trial, the writers of such letters stated that some of the letters were incorrect and others deliberately false. For example, Thomas Prentice in a letter to Wheeler Osgood Company, dated January 7, 1952 (Exhibit No. 101), stated:

> "The second consideration is the fact that the plywood market hit a slump and these slumps such as we saw in 1949 and 1950 create a conservative attitude among the plywood people with regard to the purchase of new equipment for a period of six months to a year, following the return to normal business."

At the trial Mr. Prentice testified that he was negotiating for the purchase of patent rights on a clipper machine from the Wheeler Osgood Company. In order to hold down the price, he made this false statement

at the suggestion of an employee of the Wheeler Osgood Company and this was "part of (the) manipulation."

The testimony concerning the reasons for writing other letters containing false statements were not as plausible as those given for the Wheeler Osgood letter.

Plaintiffs' Exhibits 57 and 58, which contain a comparison of sales and gross profits by first and last halves of each calendar year from January 1, 1949, to December 31, 1954, are no evidence that the Smith and Tuck letters resulted in a loss of business not only during the last half of 1952, but also during the whole of 1953.

Plaintiffs' Exhibit 75, which contains a record of sales and commissions of plaintiff E. V. Prentice Machinery Co. for the year 1952 by months, is much more revealing. It shows that more than 40 per cent of the total sales and the total commissions for the year were made during the first two months. Since a great portion of these sales were the result of orders written during the year 1951 and prior to the sharp reduction in both price and production of plywood, it confirms the correlation between price and production of plywood on the one hand and the sale of equipment on the other.

In my opinion some of the fluctuations in plaintiffs' business were greater than the fluctuations in the price and production of plywood. This is true because a supplier of machinery for the plywood industry will have greater fluctuations than those of the plywood industry itself because its market is dependent upon a derived demand.

There are many other facts which were developed by the evidence which confirm my finding that neither the Smith and Tuck letter nor the offensive provisions in the leases on the Skoog machine resulted in any loss or damage to the plaintiffs. However, the facts which I have heretofore discussed clearly indicate the insufficiency of evidence adduced by the plaintiffs to show loss or damage and unsatisfactory character of the evidence that was introduced.

Defendant's evidence showed that the reduction in sales and profits which occurred in 1952 and 1953 was caused by factors other than the letter and the offensive lease provisions.

Plaintiffs announced that unless they were granted substantial damages they did not want any. In other words, they are not interested in either a nominal or a small award.

Attorneys for defendant may prepare findings of fact, conclusions of law and a judgment in favor of the defendant in accordance with this opinion.

[Endorsed]: Filed Sept. 29, 1956.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,475

E. V. PRENTICE MACHINERY CO. and
PRENTICE MACHINERY WORKS, INC.,
Appellants,

vs.

ASSOCIATED PLYWOOD MILLS, INC.,
Appellee.

Jan. 28, 1958

Appeal from the United States District Court for the District of Oregon

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Before: Fee and Hamley, Circuit Judges, and Ross, District Judge

HAMLEY, Circuit Judge:

Plaintiffs appeal from a judgment for defendant in this treble damage action brought under § 4 of the Clayton Act, 15 U.S.C.A. § 15. Prior to the nonjury trial, defendant admitted liability, but denied that plaintiffs had sustained any damage. The trial court adopted this view. On appeal, plaintiffs contend that the controlling law of damages in antitrust suits was disregarded, and that the findings of fact, in substantial respects, are clearly erroneous.

Appellant E. V. Prentice Machinery Co. (Prentice) is an Oregon partnership, organized in 1947, engaged in the business of selling plywood maufacturing equipment. Appellant Prentice Machinery Works, Inc., is an Oregon corporation, organized in March 1952 by the partners of Prentice. The corporation is engaged in the business of manufacturing plywood manufacturing equipment.

In 1950, Prentice became an authorized agent to import and sell automatic veneer patching machines manufactured in Germany by B. Raimann GMBH of Freiberg, Germany. Prentice thereafter sold a substantial number of these machines in interstate commerce.

Appellee, Associated Plywood Mills, Inc., (Associated) has, since 1941, engaged in the business of manufacturing and leasing veneer patchers known as Skoog machines. The Raimann and Skoog machines are competitive pieces of equipment.

On July 25, 1952, attorneys for Associated sent letters to twenty-nine customers of Prentice. In these letters, it was asserted that the Raimann machines infringed the patents on the Skoog machines. A demand was made that the recipient of the letter cease and desist its infringement, and that it make an account-

ing and pay damages to Associated for the claimed unlicensed use of the infringing machinery.

On August 8, 1952, Prentice commenced a declaratory judgment action against Associated, in the United States District Court for the District of Oregon. The purpose of the action was to have the Skoog patents declared invalid and not infringed. Associated filed an answer and cross-complaint, in which damages were demanded for patent infringement and unfair competition. One week after this action was begun, attorneys for Associated sent additional letters to certain customers of Prentice who had not replied to their letter of July 25, 1952, inquiring whether the alleged infringing activities had ceased.

A jury trial of the declaratory judgment action resulted in a verdict for Prentice. Prentice then applied for an allowance for attorney's fees, pursuant to 35 U.S.C.A., § 70. The court, after hearing, found that Associated had been guilty of such unfairness and inequitable conduct that it would be grossly unjust for Prentice to bear the burden of its own attorney's fees. E. V. Prentice Co. v. Associated Plywood Mills, 113 F. Supp. 182, 188.[1] On May 8, 1953, judgment was

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[1]35 U.S.C.A., § 70, was superseded on July 19, 1952, by 35 U.S.C.A., § 285. The parties were in agreement, however, that the new provision neither enlarges nor diminishes plaintiffs' rights. See 113 F. Supp. 182, 183.

entered in that action declaring the Skoog patents invalid, and awarding Prentice an attorney's fee in the amount of $7,500.

Prentice then began the instant action in the same court on July 30, 1953. Seeking treble damages, Prentice alleged that Associated had engaged in specified activities violative of the antitrust laws. Principal among these, according to the complaint, was the action of Associated's attorneys in sending out the letters which have been referred to above. In the original complaint, Prentice sought recovery of triple the sum of $300,000. By pretrial amendments, the basic amount claimed was raised first to $600,000, and finally to $1,500,000.[2]

At the commencement of the trial, and for the purposes of this proceeding only, Associated admitted liability in violating the antitrust laws, and waived all defenses relating to the issue of its liability to plaintiffs. In doing so, it expressly reserved for determination in this action the question of whether appellant sustained any damage by any act of Associated as-

[2] Prentice Machinery Works, Inc., was added as a party plaintiff shortly before the trial. An attorney for United States Plywood Corporation stated to the court, at the outset of the trial, that his client had purchased all of the assets and assumed all of the liabilities of Associated, and would be responsible for any judgment entered against Associated.

serted in this action. The trial therefore proceeded on the single issue of damages.

In rendering judgment for Associated, after the trial on this issue, the court found that neither plaintiff sustained any damage by reason of any act of Associated asserted or assertable in this action.

Appellants contend that, regardless of the evidence in this case, the trial court should not have made such a finding, because Associated was bound by contrary findings made in the prior proceeding. The particular findings entered in the previous case (113 F. Supp. 182) on which appellants rely are set out below.[3]

The principal [sic] here sought to be invoked is that of collateral estopped by judgment. This doctrine makes conclusive in subsequent proceedings determinations of fact, and mixed fact and law, that were essential to the earlier decision. It is predicated on the idea that once a party has fought out a matter in litigation with the opposing party, he cannot later renew the duel.

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[3] ". . . The receipt of such letters caused great consternation among Prentice's customers and effectively stopped sales of Raimann machines, as well as other equipment sold or distributed by Prentice." (p. 184)

"Associated, when it sent letters to 29 of Prentice's customers threatening patent infringement actions and demanding damages, knew that such letters would effectively stop future sales of the Raimann machine and would probably require Prentice to inform its customers that it could neither defend them against such actions nor assume liability for damages in the event such cases were decided in favor of Associated." (p. 187)

"Associated knew that Prentice would necessarily incur heavy financial losses by the mailing of such letters to Prentice's customers." (p. 188)

Commissioner of Internal Revenue v. Sunnen, 333 U. S. 591, 598.

In the prior proceedings, the question for determination was whether attorney's fees should be awarded to Prentice, the prevailing party in that case. In making that determination, the court properly indicated that it would be guided by the criteria stated in Park-in-Theatres v. Perkins (9 Cir.), 190 F. 2d 137, 142. In the latter decision, it was held that an attorney's fee may be allowed in cases of this kind, where there is a finding of unfairness or bad faith in the conduct of the losing party, or some other equitable consideration of similar force, which makes it grossly unjust that the winner of the lawsuit be left to bear the burden of his own counsel fees.

In holding that Associated had been guilty of such conduct, and that it would therefore be unjust for Prentice to bear its own counsel fees, the court in the prior proceedings made detailed findings of fact. The purport of these findings is that Associated, with full knowledge of the doubtful validity of the Skoog patents, and for the purpose of destroying the Prentice competition while avoiding a court test, engaged in the criticized activity. These findings were adequate, under the Park-in-Theatres criteria, to support the order allowing attorney's fees.

The additional findings, to the effect that the objectionable conduct had actually resulted in damage to Prentice, were therefore not essential to that decision. This being the case, the doctrine of collateral estoppel by judgment does not bind Associated with respect to the prior findings on the question of damages.

As before indicated, the trial court here held that appellants failed to prove that they had sustained any damage.

Regarding the quantum of proof required to establish the fact of damage, the rule is that the plaintiff is required to establish with reasonable probability the existence of some casual [sic] connection between the defendant's wrongful act and some loss of anticipated revenue. Flintkote Company v. Lysfjord (9 Cir.), 246 F. 2d 368, 392, cert. den. ——U. S.——.

In an effort to provide such proof, appellants sought to show that they had suffered a substantial decline in business immediately after the wrongful acts were committed by Associated, and that this decline was caused by such acts. It was established by oral testimony and business records that Prentice experienced very poor business for a period of months after the letters were sent to its customers on July 25, 1952. No Raimann machines were sold between then and

November 1952. The other business of the two appellants was also at a very low ebb at that time. After November 1952, the business of the two appellants slowly picked up. This followed, in point of time, the termination of the patent litigation and notification to Prentice customers that Associated's patent claims had been rejected by the court.

Appellants asked the trial court to infer, from this coincidence in point of time, that the decrease in business resulted from the wrongful acts. Additional evidence was also submitted tending to establish such a causal connection. There was oral testimony that Prentice was "deluged" with telephone calls and letters from customers who had received the Associated letter. All were concerned with the threat of infringement suits, and inquired what protection Prentice would give them.

There was also testimony that, as a result of such letters, customers and prospective customers indicated a loss of confidence in appellants. The business of manufacturing, selling, and servicing plywood machinery on a prosperous basis was pictured as one which was especially dependent upon maintenance of an unchallenged reputation for stability and responsibility.

Associated offered little, if any, evidence to dispute appellants' showing that they had experienced very

poor business from July to November 1952, after which trade gradually picked up. Associated did, however, submit evidence in contradiction of appellants' contention and evidence that the latter's lack of business during this period resulted from the circulation of the threatening letters.

This evidence consisted of oral testimony, including crossexamination of appellants' witnesses, and certain letters taken from appellants' files. It tended to show that appellants' low level of business from July to November 1952 was the continuation of a trend which began in the spring of that year. This downward trend, according to the evidence produced by Associated, resulted partly from a deterioration of general economic conditions in the plywood industry. It was also, if Associated's testimony is to be believed, due partly to customer dissatisfaction with the Raimann machines, and to poor selling public relations practices on the part of appellants.

The trial court apparently accepted as true appellants' showing that they experienced a low level of business in the summer and fall of 1952. But the court found, contrary to appellants' thesis, that the poor business then experienced did not result from the circulation of the threatening letters. Finding Associated's evidence concerning causation more convincing

than that of appellants, the court held that other factors were responsible.

Specifically, the court found that there was customer dissatisfaction regarding the Raimann machines and other machines purchased from appellants, and with the latter's service and sales policies. It was also found that appellants failed to conduct and operate their business in an aggressive and businesslike manner.

This, and a sharp decrease in plywood prices prior to and during the period in question, the court found, caused the decline in appellants' business. The downward trend in that business began, according to the findings of fact, several months prior to the circulation of the threatening letters. The ultimate finding, as before noted, was that neither appellant sustained any damage by reason of any act of Associated asserted or assertable in this action.

Much of appellants' argument in this court is directed to the proposition that the evidence which they submitted concerning the amount of damages sustained was sufficiently certain to support a substantial award. The trial court, however, found against appellants on the question of the fact of damage, and so did not reach the question of the extent of damage. It follows that the rules of law applicable to the determination of

the amount of damages in cases of this kind do not concern us on this review.

Appellants' documentary evidence showing the low level of their business in the latter part of 1952 was, as before indicated, apparently accepted by the trial court as establishing that fact. On the basis of such evidence, and in the absence of conflicting evidence, the trial court could have inferred therefrom, and found, that appellants' business recession was caused by the wrongful acts of Associated. Bigelow v. RKO Radio Pictures, Inc., 327 U. S. 251, 264.

But the trier of fact was not compelled to draw such an inference, where, as here, there was substantial evidence tending to show that the drop in appellants' business was due to other causes.[4]

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[4]In all but one of the cases cited by appellants, the question was not (as it is here) whether a finding **against** plaintiff on the question of causation (or amount of damages) is supportable, but whether a finding or verdict **for** plaintiff on this question may be sustained. See Bigelow v. RKO Radio Pictures, Inc., 327 U. S. 251, 264; Story Parchment Co. v. Paterson Co., 282 U. S. 555; Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359; American Crystal Sugar Co. v. Mandeville Island Farms (9 Cir.), 195 F. 2d 622, cert. den. 334 U. S. 957; Universal Pictures Co. v. Harold Lloyd Corp. (9 Cir.), 162 F. 2d 354; International Industries & Developments, Inc. v. Farbach Chemical Co. (6 Cir.), 241 F. 2d 246; Kobe, Inc. v. Dempsey Pump Co. (10 Cir.), 198 F. 2d 416, cert. den., 344 U. S. 837; Connecticut Importing Co. v. Continental Dist. Corp. (2 Cir.), 129 F. 2d 651, cert. den. 317 U. S. 664; American Can Co. v. Ladoga Canning Co. (7 Cir.) 44 F. 2d 763, cert. den., 282 U. S. 899; William H. Rankin Co. v. Associated Bill Posters of U. S. (2 Cir.), 42 F. 2d 152, cert. den., 282 U. S. 864. Needless to say, a holding that the evidence is sufficient to support a finding or verdict that the established decrease in business was caused by a defendant's wrongful acts is not authority for the proposition that a contrary finding or verdict on that fact question must be set aside.

In American Cooperative Serum Ass'n v. Anchor Serum Co. (7 Cir.), 153 F. 2d 907, cert. den. 329 U. S. 721, cited by appellants, the trial court's action in setting aside the jury's special verdict to the effect that the plaintiff had not

It is true that a plaintiff may recover for loss to which a defendant's wrongful conduct substantially contributed, notwithstanding that other factors also contributed. Restatement, Torts, § 431. However, as pointed out in Momand v. Universal Film Exchanges (1 Cir.), 172 F. 2d 37, 43, this is true only where the defendant's contribution is substantial and shown by the evidence. Here the court found, on the evidence submitted, that the wrongful conduct for which Associated is chargeable contributed not at all to appellants' poor business showing in 1952 or later years.

The evidence on the basis of which this finding was made is in conflict. The credibility of one of appellants' principal witnesses was also drawn into question because of the contradiction between his oral testimony and the letters he and others had written for Prentice. The trial court resolved this conflict and question of credibility in favor of Associated. The findings of fact which resulted were not clearly erroneous.

In reaching this conclusion, we have taken into consideration the fact that, in the prior hearing, and

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been damaged by the defendant's price cutting was affirmed. But the court there stated that it was applying 15 U.S.C.A., § 13(b), a provision of the Robinson-Patman Act. This section provides that, upon proof being made that there has been discrimination in the matter of prices, services, or facilities, the burden of rebutting "the prima facie case thus made" by showing justification shall be upon the defendant. No such statute is involved in the instant case. Moreover, there was not, in that case as there is here, substantial evidence contradicting the plaintiff's theory of causation.

on two different occasions during the progress of the present hearing, the trial judge expressed the view that appellants' business stopped as a result of the circulation of the letters. When the evidence was all in, however, the judge, as he had the right to do, changed his mind as to what the evidence proves.

Since there was substantial evidence to support the final view, incorporated in the findings of fact, the circumstance that it is inconsistent with preliminary views expressed during the trial, or expressed in another proceeding which is not binding here, is without significance.

Appellants call attention to the importance which the trial court placed upon the absence of testimony by prospective customers that they had withheld custom because of the threatening letters.

This was not, as appellants urge, an indication that the court believed that, in cases of this kind, the fact or amount of damage could be proved only by such testimony. It means only that, faced in this particular case with conflicting evidence which the court thought preponderated in favor of Associated on the question of causation, the absence of direct customer-testimony which might have turned the scales the other way was considered significant enough to be noted.

This is not indicative of an erroneous view of the law of damages, but is a permissible exercise of the fact-finder's function to appraise the evidence, draw or reject inferences therefrom, and indicate the considerations which led to the view adopted.

Affirmed.

(Endorsed:) Opinion. Filed Jan. 28, 1958.
Paul P. O'Brien, Clerk.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,475

E. V. PRENTICE MACHINERY COMPANY and
PRENTICE MACHINERY WORKS, INC.,
Appellants,

vs.

ASSOCIATED PLYWOOD MILLS, INC.,
Appellee.

JUDGMENT

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and Entered: January 28, 1958
PAUL P. O'BRIEN, Clerk.

15 U.S.C. § 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

15 U.S.C. § 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

15 U.S.C. § 14:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor. or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

15 U.S.C. § 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."